

Ethics Aspects of Competitive Sourcing Office of Government Ethics (OGE) Provisions

This discusses three ethics restrictions in OGE regulations applicable to all NRCS employees, relative to competitive sourcing activities.¹

- Prohibition against conflicting interests;
- Prohibitions against representation of another to the Federal Government; and
- Post-employment restrictions.

Prohibitions Against Conflicting Interests

Prohibitions against conflicting interest are at 18 USC 208 and 5 CFR Part 2635.402 and 502.

- An employee may not participate in a contract or other particular matter involving specific parties in which, he or his spouse, minor child, general partner, prospective employer,² or organization with whom the employee is serving as officer, director, trustee, general partner, or employee, has an interest.³ An interest based solely on Federal Government salary and benefits is not considered disqualifying for these purposes.
- An employee also must not participate in a contract or other particular matter where the circumstances would cause a reasonable person with knowledge of the relevant facts to question her impartiality in the matter. This restriction applies when and if the employee knows that the matter is likely to have a direct and predictable effect on the financial interest of a member of her household, or knows that a person with whom she has a covered relationship is or represents a party. An employee has a covered relationship with a member of her household or close relative; person with whom she seeks a business, contractual, or other financial relationships other than a routine consumer transaction (not prospective employer); person for whom her spouse, parent or dependent child serves as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; persons for whom, within the last year, she worked or served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or organization (other than a political organization) in which she is an active participant.

In such cases, the employee is prohibited from participating personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.

¹This Attachment does not address the additional restrictions in FAR regulations applicable to procurement officials, and provisions in OMB's revised A-76 Circular that affect the makeup of certain competitive sourcing teams.

²Includes any person, organization or company with whom the employee is negotiating or has any other arrangement concerning prospective employment.

³That is, unless covered by a regulatory exemption at 5 CFR 2640.203(d), or issued a waiver pursuant to 5 CFR 2640.301.

OGE has issued a limited exception to the Government-wide conflict of interest rules for competitive sourcing activities. This exception allows employees whose jobs are affected by competitive sourcing to participate in related activities as part of their NRCS job. This limited exemption would allow an employee to participate in competitive sourcing matters as part of their NRCS duties, whether the matter is of general applicability or involves specific parties, provided she has no interest in the matter beyond her Federal Government salary or benefits -- *except that*, an employee may not make determinations that individually or specially affect her own salary and benefits, or those of her spouse, minor child, general partner, prospective employer, or organization with whom the employee is serving as officer, director, trustee, general partner, or employee. [(See 5 CFR 2640.203(d).] Regulations at 5 CFR 2640.301 would also allow an agency to issue an individual waiver based on written determination that an employee's financial interest is not so substantial as to be deemed likely to affect integrity of the employee's services. Authority to issue any such waiver is reserved to the Chief and the Deputy Chief for Management.

Accordingly, an employee's interest in her Federal job is not a disqualifying interest for participation in a Performance Work Statement (PWS) or Most Efficient Organization (MEO) team, even though her own position may be abolished.⁴ If a matter would individually or specially affect an employee's own Government position, the employee is permitted to make requests and recommendations in an official capacity, but not determinations.

Example 1: An employee in the NRCS Mail Room can participate in NRCS' evaluation of the feasibility of competitive sourcing for the entire NRCS Mail and Supply function, even though the employee's own position would be eliminated if that function was contracted out.

Example 2: The employee in the preceding example could not participate in the implementation of an NRCS plan to create an employee-owned private corporation which would carry out Mail and Supply functions under contract with NRCS, absent an individual waiver under 18 USC Section 208(b)(1). The employee would have a disqualifying financial interest in the matter beyond Federal salary and benefits (or Social Security or veterans benefits), because implementing the plan would result not only in the elimination of the employee's Federal position, but also in the creation of a new position in the new corporation to which the employee would be transferred. The employee would be required to disqualify himself from substantive involvement as an NRCS employee in the competitive sourcing initiative for the Mail and Supply functions because of his interest in the creation of the new position in the employee-owned private corporation.

Example 3: John Mallard, a Mail Room employee, cannot participate in NRCS' competitive sourcing activities concerning the Mail and Supply function because he is part-owner of a company that will submit a bid for the Mail and Supply function. John Mallard has an interest in the matter that is beyond just his Federal salary and benefits and, therefore, he must not participate in the matter as part of his NRCS job.

⁴ However, any interest in the matter beyond salary and benefits would be disqualifying, and the employee would have to tell her supervisor she cannot work on the matter as part of her NRCS job.

Example 4: Another Mail Room employee, cannot participate in NRCS' competitive sourcing activities concerning the Mail and Supply function because his wife is employed by the Tripple X company that will bid for the Mail and Supply function. This employee has a covered relationship with the Tripple X company and, therefore, he must not participate in the matter as part of his NRCS job.

Example 5: Affected employees inquire whether NRCS can include an employee in the National Cartography and Geospatial Center (NCGC) among those working on competitive sourcing of cartography and related functions at the NCGC. John Bledsaw, who occupies one of the NCGC positions being considered for competitive sourcing, is asked to work on this initiative. John may *recommend* what positions should be designated for competitive sourcing. However, because his own position is one of the NCGC positions being considered for competitive sourcing, John may not *decide* which positions should be designated for competitive sourcing because the matter is one that would individually or specially affect his own salary and benefits.

Example 6: An employee who has outside employment with someone competing for a competitive sourcing contract with NRCS must disqualify herself and not work personally and substantively on any aspect of that competitive sourcing initiative for NRCS, unless she obtains an ethics waiver signed by the Deputy Chief for Management.

Example 7: An employee who seeks outside employment or has an arrangement for future employment with someone competing for a competitive sourcing contract must disqualify herself and not work personally and substantively on any aspect of that competitive sourcing initiative for NRCS, unless she obtains an ethics waiver signed by the Deputy Chief for Management. For example, circumstances to which this applies include, but are not limited to, if the employee is negotiating for future employment with bidders, or has sent a bidder an unsolicited resume, or deferred employment negotiations with bidders.

Example 8: An employee (including a procurement official) is not considered to be "seeking employment" for merely requesting a job application, even if it is from a company bidding on an NRCS competitive sourcing contract. However, if and when the employee submits a job application or resume for outside employment, she is considered to be "seeking employment" and is required to disqualify herself from any substantive involvement in that competitive sourcing contract or any other matter in which the prospective employer has an interest.

Prohibitions Against Representation Of Another To The Federal Government

There are two statutory prohibitions dealing with representation of another to the Federal Government with respect to competitive sourcing or other activities in which the Government has an interest. [18 USC 203 and 205]

- 18 USC 203 prohibits an employee from *receiving compensation* for representing another to the Federal Government. There is an exception for representation of parents, spouse, children and estates except for matters the employee participated in personally and substantially as an employee, or matters within the employee's official responsibilities. This rule prohibits behind-the-scenes assistance when compensation is received.

- 18 USC 205 prohibits an employee from *communicating* with NRCS or another Federal agency *on behalf of another* with respect to competitive sourcing or other matter in which the Government has an interest. This prohibition applies whether or not the employee receives compensation. There is an exception if the representation is on behalf of an employee organization, discrimination complaint, grievance, or union. This rule does not prohibit behind-the-scenes assistance provided no compensation is received.

Neither Section 203 nor 205 prohibits representation of oneself.

Example 9: A group of NRCS employees is seeking to obtain a contract to perform a state's clerical support function through a competitive sourcing bid. A current NRCS employee may not submit the proposal to NRCS on behalf of the group of employees. The employee group would need to get someone else who is not an employee to submit the proposal on their behalf.

Example 10: A group of NRCS employees is seeking to obtain a contract with NRCS to perform Cartography and related functions. Nancy Nice, an NRCS employee, knows the right people at the National Cartography and Geospatial Center (NCGC). Provided she receives no compensation for doing so, Nancy can work behind-the-scenes to help the employee group get the contract. For example, she can coach a non-employee on 'who to contact' and 'how best to approach' NRCS to present the proposal on behalf of the employee group.

Example 11: Outsourced United is a group of NRCS employees seeking to obtain a contract through NRCS competitive sourcing activities. They contact Nancy Nice and offer to pay her to assist them in getting the contract. Nancy may not represent them by communicating with NRCS on their behalf because she is an employee. As a Federal employee, she also may not help them behind-the-scenes for compensation because the Government has an interest in NRCS' competitive sourcing matters.

Post-Employment Restrictions

A post-employment violation occurs when all of the following are true:

1. A former employee contacts a current Federal employee;
2. The contact is on behalf of another with the intent to influence the current employee or Agency (or appears to be with the intent to influence);
3. The contact was with respect to a particular matter involving specific parties; and
4. The former employee was substantively involved with that same particular matter involving specific parties while still employed with NRCS (a lifetime ban); or the particular matter was under his/her area of responsibility within the last year of employment with NRCS (a two-year ban).

In addition, within one year of departing, a member of the Senior Executive Service (SES) paid at or above level ES-5 level may not communicate to, or appear before, a current USDA employee with the intent to influence, in connection with any matter on which she seeks official action.

Answers to Frequently Asked Questions About Competitive Sourcing

Question 1: Can someone who is a current Federal employee bid or submit a proposal for a contract?

Answer: Yes, an employee is allowed to represent herself to the Government so an employee can bid or submit a proposal on a contract. However, a provision in the FAR Regulations prohibits the Government from awarding a contract to a Government employee except for the most compelling reasons. [See 48 C.F.R. § 3.601 and § 3.602.]

Question 2: Can a group of employees (acting in their personal capacities) bid or submit a proposal for a contract?

Answer: Yes. However, there may be restrictions on members of that SSB or certain other procurement officials. SSB members and other procurement officials must seek advice and instruction on a case-by-case basis from the HCAD. A group of employees (acting in their personal capacities) seeking to bid or submit a proposal to NRCS for a competitive sourcing contract must get a non-employee to actually submit (i.e., transmit) their bid to NRCS, and to otherwise communicate with NRCS about their bid. [See the discussion about *Prohibitions Against Representation of Another to the Federal Government*, and Example 9, above.]

Question 3: Can a retired Federal employee bid or submit a proposal for a contract?

Answer: Yes. However, there may be restrictions on certain former procurement officials.

Question 4: Can an employee retire or leave Federal service and go directly to work for a company providing services to NRCS through Competitive Sourcing?

Answer: Yes, except for certain procurement officials. For a period of one year, certain procurement officials who leave Federal service may not accept compensation from a company that has a contract with USDA or NRCS. Also, although any employee (who is not a procurement official) can leave and go directly to work for such a company, there may be restrictions against the former employee contacting a current employee on behalf of that company. See “Post-Employment Restrictions,” above. Note: There are restrictions on the official duties of a current Federal employee once she begins “seeking [outside] employment”. See Example 8.

Question 5: Can an employee leave NRCS and then contact a current employee on behalf of a non-profit conservation group trying to get a competitive sourcing contract?

Answer: The answer is “no” for all employees who worked personally and substantially on the same particular matter involving specific parties before leaving NRCS. (Lifetime ban.) The answer is also “no” for all employees whose area of responsibility included the same particular matter involving specific parties during their last year with NRCS, even

though they did not work on the matter personally and substantively. (Two-year ban.) For all employees paid at or above the SES-5 level, the answer is also “no” for the first year after departing, even if they were in no way connected to these matters while still employed by NRCS. For all other employees, the answer is “yes.”

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